Supreme Court, U.S.
FILED
OCT 10 2000
CLERK

(4)

No. 00-31

IN THE

SUPREME COURT OF THE UNITED STATES

THE CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND,

Petitioner,

v.

UNITED STATES; MONTGOMERY COUNTY, MARYLAND and COLUMBIA COUNTRY CLUB,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEFS IN OPPOSITION

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JURISDICTION

The United States suggests that there is an issue as to timely filing of the petition for writ of certiorari, although it stops short of actually arguing that the filing was late. The Land Company made a timely petition for rehearing en banc before the Federal Circuit, which was denied less than 90 days prior to its filing this petition. A petition for rehearing en banc is a petition for rehearing within the meaning of Sup. Ct. Rule 13(3). Indeed, the Advisory Committee Note to the 1998 amendment to Fed. R. App. Pro. 35(b) indicates that the terminology "petition for rehearing en banc" was chosen expressly to make clear that such a petition was encompassed within Rule 13(3). The only significance of the term "en banc" is to denote that the petition is directed to the full court, not the three-judge panel that issued the original decision. Since both the full court and the panel have power to entertain a petition for rehearing, there is no basis to distinguish between them for finality purposes. The time for petition to this Court starts running when the lower appellate court has definitively ruled.

ARGUMENT

I. The Opinion of the Maryland Court of Appeals Does Not Control the Takings Issue

The oppositions to certiorari of both the United States and Montgomery County (collectively, the "Opponents") repeat and re-emphasize the legal error made by the United States Court of Appeals for the Federal Circuit in rejecting this takings case: both treat the opinion of the Maryland Court of Appeals as definitive, without need for further analysis, referring to the state court's supposed expertise in determining issues of state law. *See* Brief for the United

States in Opposition ("U.S. Oppos.") at 10 & 13; Opposition to Petition for Writ of Certiorari ("Mont. Co. Oppos.") at 17. Analysis of a takings claim, however, requires assessment of the "background principles of state law" relevant to the asserted property interest and cannot be evaded by treating the views of a state court as, *ipso facto*, dispositive.

The ultimate question in this federal takings case is whether the property right that the Land Company had in 1911, at the time it conveyed an easement that the Maryland Court of Appeals agrees was intended to be for railroad purposes, is the same property right it was left with in 1988, after the Railroad had abandoned its interest in the property and after Montgomery County claimed the right to occupy the property for public recreational and other non-railroad purposes, on the strength of a federal statute enacted in 1983. That issue is not an issue of "state law" in the same sense as the cases deferring to state court statutory construction cited by the Opponents. It is a question of federal constitutional rights, assessed against the background of primarily non-statutory state law.

The Federal Circuit wrongly abdicated its responsibility to determine whether the Land Company's property interest was taken. App. 6. By deferring, without independent analysis, to the advisory opinion of the Maryland Court of Appeals, the Federal Circuit committed a variant of the Second Circuit's error corrected by this Court in *Preseault v. United States*, 494 U.S. 1 (1990). The Second Circuit had treated an ICC determination that the Rails-to-Trails Act applied to certain property as preemptive, for all purposes, of any contrary state law property rights. *Id.* at 10. This Court rejected such deference to the regulatory body as to the takings question: "The Commission's actions may delay property owners' enjoyment of their reversionary

interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights." *Id.* at 22 (O'Connor, J., concurring). The assessment of the Maryland Court of Appeals is no more dispositive here than was the ruling of the ICC in *Preseault*: it was for the Federal Circuit, in review of the decision of the Court of Federal Claims, to determine the nature of the Land Company's property interest.[1] If a state court's assessment of the nature of such an interest were automatically correct for constitutional purposes, then this Court would have been powerless to reverse the South Carolina Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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[1] Contrary to the claim of the United States, *see* U.S. Oppos. at 8-9, the Land Company does contend that the Federal Circuit "applied the wrong constitutional standard," both by merely deferring to the Maryland Court of Appeals and by implicitly endorsing that court's failure to apply appropriate "background principles."

The United States also mischaracterizes the Land Company's view as to whether the Federal Circuit committed error in certifying issues to the Maryland Court of Appeals. *Id.* at 9. It was error to do so, as the Land Company argued to the Federal Circuit, because there was existing dispositive state authority. *See* Md. Cts. & Jud. Proc. Code § 12-603; Land Co. FC Reply Brief at 34. That error would have been harmless, however, had the Federal Circuit, upon receipt of the answers, fulfilled its responsibility to independently, and accurately, determine whether the Land Company's property interest was taken. The Federal Circuit's failure to perform the latter function was its fundamental error. A federal court may not merely delegate resolution of federal issues to a state court.

II. "Foreground Principles" Were Used To Strip the Land Company of Its Property Rights

Neither Opponent challenges the constitutional importance of arriving at a proper understanding of the "background principles of state law" relevant to takings cases. They instead devote the thrust of their oppositions to trying to show that the Maryland Court of Appeals' opinion can be justified on the basis of traditional Maryland state law. In doing so, both Opponents ignore much of the reasoning of the Maryland Court of Appeals, in both this and prior cases.[2] An objective review of that court's reasoning can leave no doubt that the "background principles of state law" were not applied and that this case, accordingly, presents the question whether such principles are infinitely manipulable or, instead, represent a true constraint on governmental seizure of private property for public use.

A. The scope of the easement

Neither Opponent adverts to the long line of Maryland cases cited by the Land Company, originating well prior to 1911, holding that the intent of the parties is the critical factor in determining the scope of an easement. Petition for Writ of Certiorari ("Pet.") 16. Nor does either Opponent address the Maryland Court of Appeals having specifically found that the intent of the parties in 1911 was to devote the easement to the same use that had been in place since 1892: railroad purposes. *Id.* at 17. Neither the Opponents, nor the Maryland Court of Appeals, point to any

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[2] They also fail to address the ruling of the Court of Federal Claims, which would have found a taking if, as is now no longer in dispute, the interest conveyed to the Railroad was an easement. App. 182 & 189.

evidence that the parties contemplated a recreational trail use for the easement. Indeed, the Maryland Court of Appeals acknowledged that such was not their intent. App. 47.

There simply was no prior principle in Maryland law that uses not contemplated by the parties could be read into the grant of an easement based on the granting deed not containing an express limitation on the scope of the right of way. The Maryland Court of Appeals essentially acknowledged that a broad scope of use could not be gleaned from the language of this deed, when it held, in reliance on *D.C. Transit System, Inc. v. State Roads Comm'n*, 270 A.2d 793 (Md. 1970), and *East Washington Ry. Co. v. Brooke*, 223 A.2d 599 (Md. 1966), that the deed granted an easement and not fee simple.[3] App. 27-29. As the Maryland Court of Appeals stated, the deeds in both *D.C. Transit* and *Brooke* were substantially broader than the present deed conveying a "right of way," as they purported to convey land outright, with arguable references to a more limited purpose being found only elsewhere in the deed. *Id.* Both those deeds were, nonetheless, construed by the Maryland Court of Appeals as easements for railroad purposes[4] and thus stand directly contrary to the conclusion of the Maryland Court of Appeals in this case that the present right of way conveyance to a railroad, admittedly for the purpose of operating the railroad that was in place at the time the deed was given, was not limited to railroad purposes.

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[3] The Land Company disagrees with the United States that the Maryland Court of Appeals' assertion that "ambiguities in easement grants must be 'resolved in favor of the grantee,'" is consistent with precedent. U.S. Oppos. at 11 n.9. Easements are to be narrowly construed, consistent with the intent of the parties and especially of the grantor. Pet. 16 & 18 (citing cases).

[4] *D.C. Transit*, 270 A.2d at 800; *Brooke*, 223 A.2d at 603.

While *DC Transit* and *Brooke* post-date 1911, they are fully consonant with the principle reflected in 1911 Maryland law that the scope of an easement is to be determined by the intent of the parties. The Maryland Court of Appeals' decision in 1999 in this case can be squared with neither its earlier cases nor the law as it was applied in 1911. It is, accordingly, not an application of the "background principles of state law," but a result-oriented invention of new principles.

The Maryland Court of Appeals' principal effort to justify its result in pre-1911 terms (for that matter, in pre-1999 terms), was to try to apply by analogy a line of highway easement cases that had permitted horse or electrical street trolleys to be constructed in the bed of a highway. Those cases cannot be stretched to cover the substitution of a recreational trail for a railroad, because they explicitly relied on trolleys being a mere technological improvement on prior modes of highway transport, therefore within the contemplation of the grantor of a highway easement, and on the fact that street trolleys did not exclude the existing, and original, use. They thus do not support the view of the Maryland Court of Appeals that all easements with some form of public transit purpose were recognized prior to 1911 as permitting unrestricted changes in the mode of transportation.

The United States argues that the Land Company has merely advanced "its own, narrower reading of these precedents," U.S. Oppos. at 12, but that is not true. It was the Maryland Court of Appeals, in 1907, in *Baltimore Co. W. & Elect. Co. v. Dubreuil*, 66 A.2d 439, 440-42 (Md. 1907), that so analyzed that line of cases. The *Dubreuil* court did so, in part, because that was the rationale originally articulated in them, *see, e.g., Hodges v. Baltimore Union*

Pass. Ry. Co., 58 Md. 603, 619 (1882), and, in part, to reconcile them with cases like *American T. & T. Co. v. Smith*, 18 A. 910 (Md. 1889), which had held a telegraph line in a railroad right of way to be a taking if it was not directly necessary to railroad purposes, and *Phipps v. Western Md. RR Co.*, 7 A. 556 (Md. 1887), which had held the use of a highway easement for a steam railroad to be the imposition of an unauthorized servitude. The narrow rationale set forth in *Dubreuil* is clearly all the Land Company had reason to consider applicable four years later in 1911.

Nor could the holding as to the scope of the easement granted by the Land Company have been anticipated from *Whalen v. Baltimore & Ohio RR Co.*, 69 A. 390 (Md. 1908), which remarked, in passing, that a "railroad is in many essential respects a public highway, and the rules of law applicable to one are generally applicable to the other," clearly implying that, in some respects, a railroad is not a public highway. 69 A. at 393. The case gives no clue when a public highway and railroad should be treated similarly, as the only issue presented--whether specific performance would lie against a railroad to force it to maintain a siding on a portion of its line it wished to abandon--had nothing to do with public highways. Railroads and highways are clearly not equivalents for all purposes or *Phipps v. Western Md. RR Co.*, 7 A. 556 (Md. 1887), would not have treated a steam railroad in the bed of a street as a new servitude. *See also Burlington, Kansas & S.W. RR Co. v. Johnson*, 16 P. 125, 128-29 (Kan. 1887) ("A railroad and a common highway are essentially different in regard to construction, control, and use, as well as ownership, and the distinctions are so well understood that a mention of them is unnecessary."). Of course, a recreational trail is not, in any event, either a railroad or a public highway.

B. Abandonment

The non-abandonment holding of the Maryland Court of Appeals cannot be squared with an "*objectively reasonable application* of relevant precedents," as this Court required in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992). In so holding, the Maryland Court of Appeals, and, even more so, the Federal Circuit, which is charged with applying correct constitutional principles to Tucker Act claims, ignored the pertinent "background principles of state law." The non-abandonment holding is thus not only, as the United States repeatedly suggests, an erroneous factual determination, U.S. Oppos. at 13-14; it arose from a misapprehension of the critical legal standards applicable to resolution of the status of property interests for taking purposes.

The United States camouflages the extent of that departure from prior precedent by omitting, in its description of the facts, any mention of the abandonment resolution adopted by the Railroad on July 22, 1985:

> RESOLVED, that this company abandon, and [it] hereby consents to The Baltimore and Ohio Railroad Company's discontinuance of service on, that segment of its line of railroad, being a portion of the Georgetown Subdivision, between a point at or near Georgetown Junction and end of line at the Maryland-District of Columbia State Line, in Montgomery County, MD, a distance of approximately 7 miles.

As expressed effectively in Judge Cathell's dissent to the Maryland Court of Appeals opinion, App. 94-99, this case cannot be distinguished from abandonment cases like *East Washington Ry. Co. v. Brooke*, 223 A.2d 599 (Md. 1966),

where there was a discontinuance of use and the railroad's President testified there was no intention to operate a railroad over the property. There was, in fact, much more evidence of intent to abandon here, than in *D.C. Transit System, Inc. v. State Roads Comm'n*, 290 A.2d 807 (Md. 1972), where abandonment was found despite the testimony of company officials that they had been seriously considering non-railroad uses for the property. Here the evidence showed that the railroad did not intend to make any use of the property. After its abandonment resolution, but prior to being approached by Montgomery County about a possible sale of the property, the Railroad stated, under oath, that it had "not considered any alternative" to abandonment.[5]

Rather than attempt to explain the variance between its holding and cases like *D.C. Transit* and *Brooke*, the Maryland Court of Appeals relied on a conclusive presumption, invented for the occasion, that the Railroad could never have had an intent that would be inconsistent with, or inconvenient to, the operation of the Rails-to-Trails Act. App. 60-85. That was not a principle found in prior

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[5] *See also* the Court of Federal Claims views on abandonment. App. 167-75. The case of *Canton Co. v. Baltimore & Ohio RR Co.*, 57 A. 637 (Md. 1904), found no abandonment based on evidence that the easement was likely to be used. The B&O had condemned land in 1885, at a cost of $20,000, to provide a connection from its Camden Street station in downtown Baltimore to its Philadelphia Branch to the north, by way of a route through the eastern part of the city. Shortly thereafter, it made alternate, lower cost, arrangements to provide a connection by the line of another company, through a tunnel under Howard Street. When the original condemnee sued to regain its property, the evidence showed that the capacity of the tunnel had almost been reached and that business was growing, such that it would soon be necessary to revive the eastern line.

Maryland law and it was flatly contrary to the view expressed by Justice O'Connor in concurrence in *Preseault v. United States*, 494 U.S. 1 (1990), that "the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest." *Id.* at 24 (emphasis added).

Under the approach of the Maryland Court of Appeals, the federal action could never burden the property interest because such property interest has been defined to be automatically subordinate to the federal regulatory scheme. Calling this result a principle of state law or a finding with respect to intent cannot disguise that it is, fundamentally, the same defining away of the underlying property interest that was rejected in both *Preseault* decisions and in *Lucas*. *See* Pet. 7-11. This is not the meaning the easement had in 1911 when the Land Company parted with it, and the redefinition amounts to a taking of its property.

October 10, 2000

Respectfully submitted,

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